



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION II

OFFICE OF REGIONAL COUNSEL, 17th FLOOR

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NEW YORK, NEW YORK 10007-1866

JUL 18 2006

CONFIDENTIAL SETTLEMENT DOCUMENT
SUBJECT TO FED.R.CIV.P. 408

John Scagnelli, Esq.
Scarinci & Hollenbeck
1100 Valley Brook Avenue
P.O. Box 790
Lyndhurst, NJ 07071-0790

Re: Passaic River Superfund Matter

Dear John:

We appreciated the opportunity to meet with you and the representatives of the Passaic Valley Sewerage Commission (PVSC) on June 21 at the offices of the U.S. Environmental Protection Agency (EPA). As a follow-up to that meeting, we wanted to provide you with our thoughts, at least on a staff level, on the type of agreement which might be acceptable in this matter. Be advised that this is not an offer for settlement, because we are not at the point at which we have sought approval of the ultimate decision-makers in this process, as is necessary in a case of this significance. Nonetheless, we recognize the value in continuing our discussions to determine if an agreement is possible.

As we indicated during our meeting, the breadth of settlement sought by PVSC – that is, one which would provide a complete release to PVSC for liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601, *et seq.*, including a release for natural resource damages – is not feasible at this point, because of, among other things, the relatively early stage of the investigation in the Lower Passaic River Study Area (LPRSA). At this stage, it is unknown what the remedy for the Passaic River would be and what it may cost. It is similarly infeasible to estimate with any certainty a natural resource damage figure, with which the federal natural resource trustees and the State of New Jersey would need to be consulted and agree. Moreover, a supportable estimate of PVSC's contribution to the contamination in the River is another required factor in order for the United States to be able to reach a realistic agreement which provides PVSC the complete release it seeks.

Still, we believe a less expansive agreement which provides some measure of the protection PVSC seeks is worth continued discussion. The basis for such continued discussions would include PVSC's commitment to perform the work which it has presented in the technical meetings between EPA and PVSC that is estimated to cost approximately \$100 million. As proposed to us, we understand from you that such work would result in a substantial reduction in combined sewer overflow (CSO) discharges to the LPRSA. If so, a credit of some kind might be

workable. You mentioned at the meeting, however, that recent data indicates a minimal contribution to contamination of the River from the CSOs. Whether true or not, it raises the issue of whether the work PVSC contemplates would be necessary as part of the ultimate remedy chosen. That would affect such an agreement, because in order to receive a credit for the work, the work would need to be consistent with the response action eventually chosen.

We are also open to discussing a reopener which would provide both parties some protection, depending on the ultimate costs of the response action in relation to PVSC's allocated share. For example (and for illustrative purposes only), assuming that the CSO work is needed as part of a remedy, if the overall cost of the response action(s) is ultimately \$1 billion, and the work PVSC completes under this agreement is \$100 million, PVSC's eventual allocated share of liability would have to be more than 10% before it would be required to contribute more. At least two caveats would need to apply to such a structure, however: 1) no credit could be provided for any money expended by PVSC for this purpose which originates from an EPA grant; and 2) no credit could be given for work which is or may be required pursuant to any federal, state or local law, regulation, order or agreement.


Consequently, the release which we would be willing to discuss further would be partial in nature, and would be subject to a reopener if PVSC's percentage share of liability with respect to the LPRSA is greater than its expenditures relative to the total costs of the response action(s). Moreover, such a settlement would be embodied in a judicial Consent Decree, which would otherwise adhere to standard CERCLA model settlement language.

Note that these discussions relate only to settlement of CERCLA liabilities with EPA. We would need to open discussions with the federal (and state) trustees with respect to natural resource damages as contemplated by CERCLA, if PVSC so desires and the trustees are willing. If so, it may be possible to fold those discussions into those with EPA. As noted above, however, a supportable estimate of natural resource damages is more problematic since, to an extent, injury to natural resources is necessarily related to EPA-required response actions.

You mentioned during our discussion that the ongoing suit brought by the State of New Jersey against Tierra Solutions, *et al.*, may be an obstacle to agreement. As you know, an agreement solely with the federal government will not necessarily insulate PVSC from whatever may occur in the State case. Still, as we indicated during our meeting, we believe that there is benefit to continuing our discussions.

We look forward to your response. Please feel free to contact me if you have any questions.

Sincerely,



Patricia C. Hick

Assistant Regional Counsel

cc: Brian G. Donohue, DOJ